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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

WAIT RADIO, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. That court upheld orders of the FCC refusing to permit WAIT Radio to expand its services to provide new service to 4,400,000 people in the Chicago area and thereby continuing to waste a scarce radio resource.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 456 F.2d 1203 (1972) and reproduced as Appendix A to this petition. The opinion of the Federal Communications Commission under review is reported at 22

F.C.C. 2d 934 (1970) and reproduced as Appendix D. The Commission's opinion on reconsideration is reported at 22 F.C.C. 2d 1016 (1970) and reproduced as Appendix E.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1972 (Appendix B). A timely motion for rehearing was denied April 26, 1972 (Appendix C). A timely application for an extension of time in which to file this petition was granted by the Chief Justice on July 20, 1972. The time to file was extended to and including September 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the First Amendment require a court reviewing a Federal Communications Commission refusal to permit new radio service to apply a higher standard of review than the "irrational, arbitrary or capricious" test customarily invoked in routine administrative agency cases?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution which provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

Petitioner WAIT Radio is a partnership licensed to operate a daytime-only AM radio station on the 820

[1] The FCC orders under review in this case resulted from reconsideration on remand from the Court of Appeals as a result of its opinion in *WAIT Radio* v. *FCC*, 418 F.2d 1153 (1969). The court of appeals in that opinion vacated prior orders of the Commission reported at 10 F.C.C. 2d 481 (1967), reconsideration denied, 11 F.C.C. 2d 547 (1968). None of these three earlier opinions are reproduced in the appendix to this petition and are not germane to the issue presented here.

kHz channel from its location in Chicago, Illinois. WAIT is an independent, locally owned station featuring quality music and public affairs programs designed to appeal to an adult audience. WAIT presents numerous programs under the auspices of the University of Chicago—an institution with which it is closely identified in public affairs programming.

During the day WAIT radio shares the 820 kHz channel with several other stations. At night, however, WAIT and other stations are forced to shut down so that the 820 kHz channel can be monopolized by WBAP, located at Forth Worth, Texas. This nighttime monopolization results from the FCC's "clear channel" policy. Under that policy, implemented by a myriad of technical rules, twelve of the 107 AM channels are preserved for "clear channel" operation on which only one AM station in the entire continental United States is permitted to operate at night.[2] The sole purpose of this "clear channel" policy is to provide AM radio service to so-called "white areas," locations which do not have and cannot support local AM radio stations because of sparse population. The "clear channel" stations theoretically provide radio service to the "white areas" by utilization of a radio phenomenon known as "skywave" service.[3] There is no other policy or purpose for the "clear channels."

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[2] It should be noted that on perhaps as many as 5 of these channels some form of nighttime operation is permitted. For example on 820 kHz, occupied by respondent WCCO, limited nighttime operation by WNYC, New York City, is permitted.

[3] The "skywave" service consists of radio signals reflected off atmospheric layers. During the daytime these reflected waves are absorbed and do not reach the ground. However, at night the radio signals can be received at ground locations far beyond the normal "groundwave" service area of a particular station. Even when skywave service is available, however, it is erratic and of a far poorer quality than that provided by a station's groundwave.

In 1967 WAIT Radio applied to the FCC for a waiver of its "clear channel" rules and permission to operate at night. WAIT's proposal was carefully designed to insure through use of a directional antenna that it would not produce any radio interference to WBAP's service in any "white area" and thus would not interfere at all with the policy behind the "clear channel" rules. WAIT contended that since the policy of those technical rules would not be violated, the rules themselves should be waived in order to permit the proposed new service. WAIT pointed out that its proposal would provide new radio service to approximately 4,400,000 people in the Chicago area without causing any loss of service to any "white area." WAIT argued that the First Amendment and the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, require the FCC to permit maximum feasible radio service and that the Commission's refusal to waive its rules to allow WAIT's application would amount to an overbreadth of regulation in violation of the First Amendment.

The Commission responded with a perfunctory and conclusory denial of permission even to *file* the application, 10 F.C.C. 2d 481 (1967). The sole reason given was that the proposal violated the rules—a fact WAIT necessarily recognized when it sought a waiver of those rules. Reconsideration of that refusal was denied, 11 F.C.C. 2d 547 (1968), and the orders were appealed to the Court of Appeals for the District of Columbia Circuit. That court concluded that the Commission had failed to give WAIT's application a "hard look." The court of appeals held that "[w]hen an application pleads and offers factual material in support of, a nonfrivolous First Amendment contention, an agency may not dismiss it with the routine treatment that might suffice in the ordinary case." *WAIT Radio* v. *FCC*, 418

F.2d 1153, 1156 (1969). The court of appeals remanded the case to the Commission with instructions to give WAIT's application the serious and thorough consideration it deserved.

On remand the Commission accepted written submission and entertained oral argument. Again, the Commission refused to waive its rules and refused to accept the WAIT application for filing. This time the Commission's opinion was filled out with discussion of various technical aspects of the application (Appendix D). Significantly, the Commission recognized that WAIT's proposal would provide an interference-free signal to approximately 4,400,000 people in the Chicago area and would not cause *any* objectionable interference in *any* "white area."[4] In spite of these facts, the Commission denied WAIT's application on the primary ground that the 820 kHz channel should be preserved as a "clear channel" to provide flexibility for future allocations.

WAIT replied with an offer to take a conditional waiver and to cease its nighttime operations whenever it became possible for another station to operate on the 820 kHz channel and provide new service to a "white area." Again the FCC refused to waive its rules, this

[4] WAIT recognizes that this proposal would cause some interference to WBAP and stations WCCO and WGHY on adjoining channels. However, both the Commission and the court below recognized that this interference was *not* objectionable under the FCC's technical rules which define the limits of permissable interference. (App. 12a, 24a).

WAIT also recognizes its proposal would cause some "objectionable" interference to WBAP, but this interference does not occur in any "white area." Moreover the entire area of interference is served by two groundwave signals and 95.7% is served by three groundwaves, all of which are far superior to WBAP's skywave signal. (App. 21a, n. 11)

time repeatedly invoking some undefined "public interest" (Appendix E). Again an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit.

On appeal WAIT contended that the FCC's refusal to accept its application was in violation of the Communications Act of 1934 as well as the First Amendment. The court of appeals in its opinion dealt solely with the statutory issue, holding that the orders under review did not conflict with the Communications Act of 1934. The opinion was strikingly silent with respect to the First Amendment issues. The court's opinion also injected into the case for the first time the issue of the appropriate standard of review for considering the validity of FCC orders denying applications for new radio service. The court of appeals applied the "irrational, arbitrary or capricious" standard and affirmed the Commission's orders simply because it did not conclude "that the Commission's approach is either devoid of rationality, or is to be condemned as arbitrary and an abuse of discretion." (App. 14). This result was reached in spite of the fact that the court of appeals apparently was unsure of the validity of the Commission's conclusions and frankly recognized that the Commission's disposition of this case "presents problems, *some* of which we have identified." (App. 14, emphasis added).

WAIT petitioned for rehearing, arguing that the Court of Appeals had failed to apply the appropriate standard for judicial review. WAIT contended that since radio broadcasting is a form of speech affected by First Amendment interests, and since a long and consistent line of cases in this Court have held that regulations of speech must be drawn as narrowly as possible

to prohibit over-regulation, a reviewing court faced with agency decisions involving First Amendment issues cannot apply the traditional "arbitrary and capricious" standard of administrative review, but must approach the case under more stringent standards. In short, WAIT sought to have the Court of Appeals give this case the same "hard look" that court had insisted was required of the Commission by the First Amendment. WAIT's petition for rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I. The Standard of Review Applied in This Case Portends a Substantial Erosion of the First Amendment Rights of Radio Listeners and Broadcasters Alike.

It is now well settled that radio broadcasting "is clearly a medium affected by a First Amendment interest." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386 (1969). See also *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 166 (1948). Although the application of First Amendment principles may be altered slightly in the radio context, *Red Lion, supra,* that constitutional provision clearly requires radio regulation to be precise and narrow so as to insure maximum possible radio communication. This is the central theme of *Red Lion* which upheld the "fairness doctrine" regulations by pointing out that the radio spectrum is a limited resource and that some regulation of content was necessary to insure that that resource was used to maximum efficiency "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion, supra,* at 390.

Applied to the licensing context, this First Amendment principle requires the Commission to allocate frequencies in order to provide the maximum possible radio communication. Radio regulations which silence stations more than is necessary to preserve orderly communications—such as application of the clear channel rules in this case—are inherently suspect as overly-broad restrictions prohibited both by the First Amendment and the Communications Act itself.

The Commission now seems to agree with WAIT that application of the clear channel rules to completely prohibit WAIT's nighttime operation would be unconstitutional if the same goals of orderly communications could be served by allowing operation at night using WAIT's proposed directional antenna. (Appendix 18a-19a, 20a). The Commission, however, disputes WAIT's contention that the application of those rules in this case is such an example of over-regulation. It is important to emphasize that there is no dispute among any of the parties as to the basic technical facts involved in this case. The sole issue is one of deciding whether on the facts presented the clear channel rules should be waived in this specific case to permit new radio service to 4,400,000 people in Chicago and prevent continued wasting of this channel.

The role of the First Amendment in this case is not simply limited to affecting Commission decisions and inducing narrowly drawn regulations which maximize communications. That amendment also affects the role of the judiciary. The First Amendment requires closer judicial scrutiny and an insistence of higher standards of rationality in agency decisions that curtail First Amendment freedoms. Since an FCC decision to prohibit new radio service is a limitation on the rights of

radio listeners as well as broadcasters, that decision must be more than simply "rational, non-arbitrary, and non-capricious." As this Court has often indicated, limitations on First Amendment freedoms can be sustained only when there is a compelling interest, not just a "rational" one.

It is settled that regulations of speech demand a higher degree of legislative and administrative precision than do regulations of non-speech conduct:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 487-88 (1960). See also e.g., *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967); *Schneider* v. *New Jersey*, 308 U.S. 147, 162 (1939).

To insure that regulatory bodies have in fact achieved the narrowest possible limitation on speech, courts must "look even more closely" in cases involving the First Amendment, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966), for if the courts fail to carry out their function of adequate judicial review, First Amendment freedoms will slowly but inevitably be eroded at the legislative and administrative levels.

Precisely such an erosion will occur if the substantive decisions of the Federal Communication Commission are subject to judicial invalidation only when they are "devoid of rationality" or "to be condemned as arbitrary and an abuse of discretion." That standard

of judicial review is in fact no check at all on agency decision-making, and it plainly fails to give any weight at all to the important policies behind the First Amendment.

The standard of review applied in this case is strikingly familiar to the "substantive due process" standard used by this Court in 1930's when considering the constitutionality of economic regulations. Under that test government regulations "shall not be unreasonable, arbitrary or capricious," *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934). But that minimal standard of rationality required of all government regulation has never been considered sufficient justification for laws limiting First Amendment rights. Where free speech is involved, the test has always been a far more stringent one.

WAIT does not contend that a higher standard of judicial review necessarily applies to *all* FCC decisions. Indeed in most commission decisions the First Amendment is not a factor. For example in frequency allocation decisions, the Commission will have to choose among competing applicants any of whom will provide new radio service. In such a case the First Amendment interests are presumably equally well-served by any of the applicants. But where—as here—the choice is between new radio service and no new service at all, then the First Amendment is not neutral. In such cases there is a constitutional bias in favor of the additional service. After all, the only reason why radio can be licensed at all, consistent with the First Amendment, is the scarcity of radio channels. "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, *unlike other modes of expression*, it is subject

to governmental regulation." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226 (1943) (emphasis added). If in fact it is not necessary to prohibit broadcasting by a certain station at a certain time to maintain orderly communications, such a prohibition would be unconstitutional. Necessarily the benefit of the doubt must be given to the proposed new service. If there is uncertainty about the actual extent of possible interference, if there is uncertainty about the need to retain "clear channels" for future allocation flexibility, then the First Amendment requires resolution of these uncertainties in favor of the proposed new service. That constitutional presumption is effectively nullified by the minimal standard of review applied by the Court of Appeals in this case.

II. Review Should Be Granted to Clarify an Apparent Uncertainty as to the Proper Role of the United States Court of Appeals for the District of Columbia Circuit in Reviewing Federal Communications Commission Decisions.

Under the Communications Act of 1934, the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Commission decisions respecting the grant, denial, modification or revocation of certain permits and licenses issued by the Commission. 47 U.S.C. § 402(b). Thus the vast bulk of judicial precendent involving the Federal Communication Commission consists exclusively of decisions of that court. Other courts of appeals are rarely faced with FCC issues and unlike the situation in most other areas of federal law, there is little opportunity for dialogue and interchange among the various circuits in the area of FCC litigation. Thus the Court of Appeals for the District of Columbia has been forced to become a specialist in communications, with rare and infrequent review of its decisions by this Court.

Petitioner respectfully submits that the Court of Appeals is presently experiencing a period of difficulty and uncertainty as to the proper interplay of the First Amendment, the Communications Act of 1934, and fundamental principles of judicial restraint in relationships with the FCC. Because this area of the law is not subject to the growth and experience available when the varying perspectives of the different circuits can be focused on similar problems, it is highly appropriate for this Court to grant review in this case.

The uncertainty petitioner senses is revealed by comparing the decision below in this case with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Business Executives' Move for Vietnam Peace* v. *FCC,* 450 F.2d 642 (1971), cert. granted sub. nom., *Federal Communications Commission* v. *Business Executives' Move for Vietnam Peace,* 405 U.S. 953 (1972).

In *BEM* the court of appeals concluded that the First Amendment required the FCC to promulgate regulations prohibiting broadcast licensees who sell commercial advertising time from refusing to sell any time for so-called "editorial" advertisements. The Commission and various commercial broadcast interests sought and obtained review in this Court, arguing that the court of appeals had improperly intervened in the province of the Commission and had misconstrued the requirements of the First Amendment as it affects FCC regulation. In essence the claim was that the Court of Appeals for the District of Columbia Circuit was assuming too "activist" a role and was substituting its own judgment for that of the Commission to whom Congress had delegated broad discretion.

In this case petitioner respectfully submits that the court of appeals has misunderstood its role and adopted too "passive" a role in the court-agency interplay. Petitioner contends the court below has effectively abdicated the role of judicial review by insisting only on minimal rationality in FCC decisions vitally affecting First Amendment interests.

Comparison of the decision below with that in *BEM* reveals a genuine uncertainty at the court of appeals level. Full examination and clarification of that uncertainty can best be obtained by granting review in this case.

The uncertainty in the court of appeals is indicated by the absence of any discussion or citation of authority by that court to support its conclusion that the orders under consideration in this case was reviewable only for errors of rationality, arbitrariness or abuse of discretion. The court below simply invoked those standards as if they were self-evident, when in fact, as has been shown, there is a substantial constitutional issue involved. Thus the standard of review invoked in this case appears simply to have emerged from the court of appeals without full and adequate judicial consideration. And the decision in *BEM* indicates that the standard applied in this case is by no means universally applied by the court of appeals in considering the validity of FCC actions.

Petitioner respectfully submits that comparison of the decision in this case with that of the court of appeals in *BEM* raises substantial questions as to the consistency of judicial approach to FCC cases and indicates considerable confusion as to the appropriate role of the court below with respect to that agency. Since

only this Court can adequately provide guidance in this case to clarify the fundamental issue of the role of the judiciary presented in *BEM*.

CONCLUSION

For the reasons stated, petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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September, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

WAIT RADIO, *a co-partnership, Appellant,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
MIDWEST RADIO-TELEVISION, INC., ET AL., *Intervenors*

No. 24,762
Argued Oct. 27, 1971
(Decided March 20, 1972.)
Rehearing denied April 26, 1972

LEVENTHAL, Circuit Judge:

This case has been here before. It is brought here by WAIT Radio, a co-partnership licensed to operate a Class II-D standard (AM) broadcast station, with 5000 watts of power on 820 kHz from Chicago, on a daytime-only-basis. WAIT is an independent, locally-owned station which broadcasts quality music and public affairs programs designed to appeal to adult audiences. During the day, other stations, elsewhere in the United States, use the 820 kHz channel. At night, however, onlyWBAP, Ft. Worth, Texas, is authorized to operate on this Class I-A clear channel. 47 C.F.R. 73.25. WAIT petitioned the FCC to enlarge the daytime-only authorization. It seeks to operate full time at 10,000 watts, with a directional antenna system, in order to furnish its distinctive service to almost four and one half million listeners in Chicago.

The Commission met the request for a waiver of its rules by a memorandum opinion that stated that since WAIT's proposal would violate its rules, its application would be returned as unacceptable for filing. 10 F.C.C.2d 481 (1967); reconsideration denied, 11 F.C.C.2d 547 (1968). In WAIT Radio v. FCC, 135 U.S.App. D.C. 317, 418 F.2d 1153 (1969) (WAIT-I) we reserved judgment on the merits and remanded to the Commission for their reconsideration. We

said that we must be satisfied that the agency had taken a "hard look" at the case, because "[w]hen an application pleads, and offers factual material in support of, a non-frivolous First Amendment contention, an agency may not dismiss it with the routine treatment that might suffice in the ordinary case."

We recognized the tension between the doctrine of judicial restraint, which requires of us considerable deference to agency decisions, and the practical necessities of judicial review, which require a minimum standard of articulation, so that we may discern the path which the Commission took on the way to its result. We acknowledged the impossibility of framing a universally applicable formula "for deciding when an agency . . . has crossed the line from the tolerably terse to the intolerably mute," but we identified in this case a number of symptoms, chief among them the perfunctory character of the agency's opinion, which persuaded us that the Commission had not measured up to the minimum standards of decisionmaking.

On remand, the FCC again denied the request waiver, 22 F.C.C.2d 934, and again denied reconsideration, 22 F.C.C. 2d 1016 (1970). We are now satisfied that the "hard look" has been taken, and that we discern the Commission's path. Thus we address the substantive elements of the appeal, testing whether the FCC exceeded its discretion in denying WAIT's application for authorization to broadcast during nighttime hours. We affirm.

1. The Underlying Rules

This case involves the FCC's clear channel and nighttime broadcast rules. The rules themselves are not under attack, and we begin by sketching their content before identifying the points of dispute.

1. *The Clear Channel Rules.* The FCC's placement of stations on the 107 available frequency channels, each of the

width of 10 kHz, with the objective of providing satisfactory signal strength to as many listeners as possible and service of local origin to as many communities as possible, had to take into account behavior of radio signals. Part of the energy from the transmitting antenna of a broadcast station is called a groundwave which provides the "primary" service used in broadcasting. The groundwave travels closely along the earth's surface; its intensity diminishes with distance but remains relatively constant at any location day and night and from season to season. A "secondary" service is provided by the skywave signal, which refers to that portion of the energy which travels upward from the transmitter into the upper atmosphere. In the daytime, because of the sun, this skywave is absorbed by the atmosphere. At night it is reflected, off layers of the upper atmosphere, back to earth, at distances much greater than the reach of the groundwave signal. While less constant in intensity than groundwave signals, the skywave signals are capable of providing service when free from excessive interference on the same or adjacent channels.[1] Duplication of stations on the same channel to provide local services and to enhance multiplicity of program choices for as many listeners as possible "dilutes the effective range of nighttime skywave propagation to distant rural areas where it may not be possible to provide local transmitters."

The concept of certain channels on which only one station is permitted to broadcast at night has long been accepted in practice. Frequency allocation to unduplicated channels has been a feature of federal communications policy for almost fifty years. "[T]he primary objective of clear channel allocation [is] to render wide area service to residents of less densely populated portions of the country which are

[1] Report and Order in the matter of Clear Channel Broadcasting in the Standard Broadcast Band, 31 FCC 565, 567 (1961), hereafter cited as Report.

beyond the reach of interference-free nighttime service from other classes of stations."[2] An estimated one-half of the land area of the United States receives no usable groundwave services at night.[3] The FCC calls such underserved areas "white areas." They are concentrated in the mountainous parts of the Middle Atlantic states and in northern New England, the Upper Great Lakes, the Great Plains, the South and the Rocky Mountains area.

In order to bring some service to these white areas, the FCC has by rule reserved twenty-five of the more than one hundred available AM frequencies to the use of clear channels. Prior to 1961, a clear channel was a frequency on which only one station could broadcast during nighttime hours. One problem with this policy of exclusivity—the Commission called it a "persistently plaguing deficiency" —was that, as a result of the policy, populous areas were almost overwhlemed with signals, while sparsely inhabited parts of the country remained without adequate service.

While the population of white areas increased by about 50% during the decade 1947-57, the broadcasting services to these areas stayed at about the same level.[4] The FCC desired to improve broadcast services to white areas, but found that the only feasible route to effectuating such improvement was through a modification of the clear channel policy.[5] In a rule-making proceeding, which culminated in a report and order dated September 13, 1961, the FCC ordered that thirteen of the twenty-five clear channels be "broken down"—in other words, that thirteen of the reserved channels be cleared for licensing to a subordinate broadcaster at night. The subordinate station would be far from

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[2] Report, 31 FCC at 575.

[3] Report, 31 FCC at 568.

[4] Report, 31 FCC at 571.

[5] Report, 31 FCC at 569.

the dominant station in miles, and would not be permitted to broadcast unless it protected the dominated station's 0.5 mv/m 50% skyware contour—in other words, no "objectionable interference"[6] within roughly 700 miles of the dominant station's transmitter—and unless it also furnished some new service to a white area. This rule—usually referred to as "the twenty five percent rule"—requires that at least 25%of the proposed subordinate station's projected audience, or projected territory, must be without present primary nighttime broadcast service.[7]

"The underlying justifaction [for modifying the clear channel policy] was the compelling need to go as far as possible toward reducing the vast areas which lack any nighttime primary service."[8] The Commission referred to such things as technical and engineering improvements in equipment like directional antennae, which simplified the process of minimizing obnoxious interference; but the pole-

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[6] This term is defined in the FCC rules, 47 CFR § 73.182(w) (table), as an undesired signal whose intensity at a given point is more than one-twentieth of the intensity of the desired signal.

[7] The Clear Channel Rules state, in § 73.22:

> (b) *Minimum service to "white" areas.* No Class II-A station shall be assigned unless at least 25 percent of its nighttime interference-free service area or at least 25 percent of the population residing therein receives no other interference-free nighttime primary service.

The Nighttime Broadcast Rules, § 73.24, provide that " An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made . . ."

> (b) (3) That a proposed new nighttime operation or change in frequency of any existing nighttime operation (except Class IV stations) would (i) not cause objectionable interference to any existing station . . .; and (ii) provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area or at least 25 percent of the population residing therein.

[8] Report, 31 FCC at 572.

star of the policy was to service underserved areas. Channel 820—WAIT's channel—was not one of the channels which the Commission ordered available for duplication. It considered the idea of breaking down channel 820, but rejected it:

> In selecting 640, 820, 1160 and 100 kc for inclusion in [the no-duplication] group, we have noted that these are the only I-A channels . . . serving the West; that the West is characterized by vast regions of low population density by vast regions of low population density where skywave signals afford the only nighttime broadcast service; that a choice among skywave signals is not generally available to a substantial part of the West; and that acceptable locations for assignment of new unlimited-time stations on these channels would, in general, be limited to eastern areas already receiving abundant service. Accordingly, at this stage, we preserve the potential for improving skywave service which these channels afford.[9]

The FCC rules define a Class I station as a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances.[10] The FCC rules define a Class II station as a "secondary station which operates on a clear channel . . . and is to render service over a primary service

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[9] Report, 31 FCC at 576-7.

[10] 47 CRF § 73.21(a).

> From an engineering point of view, Class I stations may be divided into two groups . . . Class I Stations in Group I-A are those assigned to the channels allocated by § 73-25(a); on which, except to the extent provided by that section and by § 73.22, duplicate nighttime broadcasting is not permitted. . . .
>
> The Class I station in group I-B are those assigned to the channels allocated by § 73.25(b), on which duplicate operation is permitted, that is, other Class I or Class II stations operating unlimited time may be assigned to such channels.

§ 73.182(a) (1) (i) and (ii). WBAP, since it is assigned by § 73.25(a), and since it is on a channel reserved exclusively to the dominant station during nighttime hours, is a Group I-A station.

area which is limited by and subject to" interference from Class I stations.[11] There are three different groups of Class II station. Class II-A and II-B stations are unlimited-time stations—broadcasting 24 hours per day—with Class II-A stations required to operate with at least 10 kw nighttime. A Class II-D station, WAIT's category, is a limited time station. It may broadcast only from sunrise to sunset.

The regulation entitled "Engineering standards of allocation," 47 C.F.R. § 73.182, details, among other things, the protected service contours of the two groups of Class I station—that is, the duplicated and the unduplicated dominant stations. A Class I station which is on a duplicated clear channel is protected, at night,

To the 0.5 mv/m 50 percent skywave contour from stations on the same channel....

As to the other Class I stations, the rules state, 47 C.F.R. § 73.182(u) fn. 7: "Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours are protected from co-channel interference on that basis." While the FCC's brief did not elucidate this peculiar phrasing, its counsel at argument explains that this means that the signal of an unduplicated clear channel is protected on the basis that no other station is allowed on that channel at all. The signal from such favored stations, that is, is protected wherever it goes.

2. *Nighttime Broadcast Rules.* The nighttime broadcast rule is a separate rule, although interrelated with the clear channel rule. It provides that an authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a showing has been made:

That a proposed new nighttime operation or change in frequency in any existing nighttime operation ... would

[11] 47 CFR § 73.21(a) (2).

(i) not cause objectionable interference with any existing station . . ." and (ii) provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area or at least 25 percent of the population residing therein.[12]

Thus the nighttime broadcast rules supplement the clear channel rules in terms of avoiding "objectionable interference," and add the 25% new service requirement as a condition for new nighttime operations.

II. *The Commission's Exercise of Its Discretion in Declining To Issue a Waiver*

[1, 2] At the Commission level, WAIT sought a waiver of the FCC's clear channel rule, which as it stands prohibits any station other than WBAP on 820 kHz. It had a heavy burden. As we noted in *WAIT-I*: "An applicant for waiver faces a high hurdle even at the starting gate." 135 U.S. App.D.C. at 321, 418 F.2d at 1157. On its appeal to this court, the burden on WAIT is even heavier. It must show that the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion. In order to evaluate that legal contention, we shall consider the strands of public interest identified by the Commission, repeating as a preliminary observation that the role of the court is not to determine the public interest, but to determine whether the agency's delineation is contrary to law.

WAIT's Submission

In broad outline WAIT's submission is as follows. Its proposal would provide an interference-free nighttime signal to approximately 4,400,000 people in the Chicago area. Its operation will be under conditions engineered to insure that no objectionable interference will result to any other

[12] 47 CFR § 73.24(b) (3).

station. The Commission has not presented any valid reason why such limited operation should not be permitted.

The development of this submission puts forward several matters. First, WAIT notes that waiver requests in general face an adverse presumption. It agrees that if a waiver would violate the policy of the rule, it can only be justified by an affirmative showing of countervailing considerations. In its case, however, WAIT says that it has shown that its application violates the letter of the rule, but not its policy. On such a showing, it is argued, the rule itself no longer retains an adverse presumption. Though appellant does not use this analogy, its contention seems to liken the situation to the kind of presumption that lays only a burden of coming forward with evidence; once such evidence is adduced, the presumption drops from the case. What is left then, is a normal application to supply additional service, and that is said to be favored by a presumption in favor of the application. This favoring presumption is related to the public interest in hearing new voices, and to First Amendment considerations.

In support of the premise that its proposal does not conflict with the policies underlying the rules sought to be waived, WAIT says that these policies seek to avoid "objectionable interference" with WBAP's "clear channel" signal in a "white area." WAIT concedes that its proposal would cause some "slight interference" with WBAP's signal in a cresent-shaped area that runs from Kentucky to South Dakota, in which about 2,170,000 people reside. But it points out that this area is served by at least two nighttime primary radio signals, and indeed by at least three primary signals as to more than 95% of this area. Thus the interference area is not "white," and indeed, says WAIT, is not even "grey"—for in view of the strong ground signals available here, the erratic and lesser skywave service available from WBAP is an insubstantial consideration.

WAIT also concedes that its proposal would cause "some interference" with the signals of stations which occupy adjoining clear channels (WCCO, Minneapolis, 830 kHz and

WGY, Schenectady, 810 kHz). But this beyond the "0.5 mv/m-50%" skywave contour that identifies a station's normally protected contours under the FCC rules.

Policy of Non-Duplicated Channels

The FCC's opinion stated that while its clear channel rule was not sacrosanct, it had concluded in its last rule-making that 12 of the 25 clear channels should not be duplicated at all, in contrast to the 13 clear channels that might be duplicatd at night under certain conditions, including avoidance of "objectionable interference." After 16 years of study the Commission issued its 1961 Report embodying the determination to avoid any duplication on 820 and certain other clear channels serving the West, in view of the needs of this area of low population density for skywave service the fact that acceptable locations for unlimited-time stations on these channels would, in general, be in eastern regions already receiving abundant service. "Accordingly, at this stage, we preserve the potential for improving skywave service which these channels afford."

The Commission stated that WAIT's proposal would hamper the FCC in future allocations regarding nighttime broadcasting on 820 kHz, or possibly in authorizing clear channels with "super power." The Commission gave, for purposes of illustration, the case of station WDAE, Ellsworth, Maine, which has asked by way of a rule-making for permission to broadcast on channel 820 during the night. If this proposal were accepted, there would be no interference with any existing signal, and new service would be furnished to many persons in white areas; but the efficiency of WDAE's proposal would be severely compromised if the WAIT proposal were accepted.

We can appreciate WAIT's frustrations in offering a present service that would offer, in its submission, a desirable present service, only to be told it must be rejected on grounds of possible interference with some future service of a nature that is not specified, and indeed that in the

nature of the case cannot be specified. We need not consider whether the future potentiality consideration would of itself suffice to justify indefinite retention of a policy maintain certain channels as inviolably clear. But it suffices to support the Commission's answer, that WAIT errs in saying it does not ask the Commission to give up a policy. The Commision is being asked to give up a policy of retention to await future developments, and to surrender flexibility in dealing with allocation problems in the future.

[3] WAIT's rejoinder is that it will accept a grant on the condition that the grant must be surrendered when, as and if a future development emerges in fact. This offer is hardly conclusive. An agency can realistically take into account that such a conditional grant would generate a vested interest in fact that undercuts flexibility. The Commission noted the "precedential impropriety of granting a conditional waiver" as of "major concern," and referred to "the almost unimaginable consequences" of such an action unless there is a concomtant showing that the waiver is in the public interest.

The curtailment of future flexibility provides an element of public interest that justification provides an element of public interest that justifies the Commission in not granting the waiver sought where, as here, the Commission identfied aspects of WAIT's proposal which it found raised problems in terms of the public interest.

Interference

The FCC noted that the WAIT proposal concededly took away a third or fourth service (from WBAP) from millions of people in the cresent area. Although WAIT offered evidence that WBAP is not listened to in this area, there was contrary material before the FCC.[13] And the Commission

[13] We are advised that at its oral argument, the FCC was informed that a WBAP night contest elicted some 1500 entries—mostly from Illinois.

stressed that it was being asked to cancel this in behalf of a 26th nighttime service in Chicago.

The Commission also considered interference to WBAP beyond its 0.5 mv/m-50 percent skywave contour, and to WCCO and WGY, the stations on the frequencies adjacent to 820 kHz. WAIT correctly points out that this interference is not defined as "objectionable interference" under the FCC's rules. But the FCC states that while this meant that such interference would not be an impediment if there were reason for the grant, it was still interference. The FCC explained:

> Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference.

And such interference was unwelcome—and not justified when wrought at the behest of a 26th nighttime service in Chicago.

Lack of New Primary Service

The Commission stressed that WAIT did not offer any service to an area or population previously without primary service. There is some technical jousting as to whether the 25% rule (supra note 7) is applicable in terms. We find it necessary to decide the matter, because obviously the policy is one that the FCC could take into account in deciding whether to grant a waiver. If a 25% new service requirement, assuming service in an area previously without primary service, must be met by an applicant seeking to be licensed for fulltime operation, as a Class II-A or II-B station, the principle of requiring some new service is fairly applicable to a II-D station seeking fulltime operation through a waiver of the nighttime restriction.

That approach would lead, says WAIT, to a situation where no big city station could ever get a waiver. We are not, however, asked to consider whether this factor alone would justify the FCC's action. We merely say it is an element of the public interest the Commission was entitled to consider.

Programming

WAIT's presentation to the FCC focused on its programming. We are not entirely happy with some aspects of the FCC's opinion on this phase of the case. WAIT's manager was asked by a Commissioner to define the "quality music" he offered, and he replied that it was semi-classical, and included Broadway show tunes. The FCC opinion contains a footnote that derides this fare as lacking the "unique" character claimed by WAIT, and as not different from that of several other stations. But what about the public affairs programs? WAIT's counsel at oral argument in this court referred to WAIT as spiritually identified with the University of Chicago, and the record contains references to programs under the University's auspices that seem, at least prima facie, to have merit.

The FCC decision states that programming is transitory, and cannot be the basis of structural grants. We take note of this only to make clear that we are not to be taken as necessarily approving that position as a universal premise. But we do not think this an appropriate case to explore the implications of this position. As we read the FCC's opinion, this was not a material element of the decisions so much as a jousting point, a pin to prick what was apparently viewed as a pretension.

Fundamental Approach

The substance of these various strands of public interest depends on a fundamental approach in weighing the considerations.

Looking at the picture in broad terms, we can fairly describe WAIT's approach as follows: The interferences in its proposal are insubstantial—like coughing in church, a vexation that is minor, all things considered, and must be taken for granted. The skywave service interfered with is relatively unimportant compared with the significant service from ground waves available in the interference area. The unused air service is an asset that is being wasted, like water passing untapped over a potential damsite.

The Commission's broad approach can be put in these terms, obviously with some simplification: The skywave service is meaningful, though inferior. The interference, though minor, is unwelcome—especially on an incremental basis. And the one-time liberality of providing new service is an approach that must be re-evaluated in order to avoid excessive interference and congestion.

Perhaps this approach of the Commission will be reshaped in the light of new technology. Perhaps, as WAIT claims, the Commission is being overly rigid even in the light of today's technology. The reviewing court has a role that is supervisory, but must be exercised with restraint. There are respects in which the commission's opinion presents problems, some of which we have identified. On balance we have no warrant for saying that the Commission has failed on remand to comply with our order that it take a "hard look" at the matter and identify its reasoning. And we have no warrant for saying that the Commission's approach is either devoid of rationality, or is to be condemned as arbitrary and an abuse of discretion.

Affirmed.

APPENDIX B

[Filed Mar. 20, 1972]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971.

No. 24,762

WAIT RADIO, A co-partnership, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

MIDWEST RADIO-TELEVISION, INC., CARTER PUBLICATIONS, INC., CLEAR CHANNEL BROADCASTING SERVICE, *Intervenors*

Appeal from the Federal Communications Commission.

Before: FAHY, Senior Circuit Judge, and McGOWAN and LEVENTHAL, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Communications Commission appealed from herein is hereby affirmed.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

Dated: March 20, 1972.
Opinion by Circuit Judge Leventhal.

APPENDIX C

[Filed Apr. 26, 1972]

[Caption omitted in printing]

Order

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

Senior Circuit Judge Fahy did not participate in the foregoing order.

APPENDIX D

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

[Caption omitted in printing] [1]

Memorandum Opinion and Order

Adopted: May 6, 1970; — Released: May 11, 1970.

By the Commission: Commissioners Burch, Chairman; and Johnson concurring in the result.

Commissioner Robert E. Lee absent.

1. The Commission has before it for consideration the above application which the applicant (WAIT) tendered for

[1] [Footnote to caption omitted].

filing on March 7, 1967, with a request for waiver and petition for oral presentation, and pleadings in opposition and response. On October 25, 1967, this Commission by Memorandum Opinion and Order denied the petition for waiver of certain technical rules and returned as unacceptable for filing the standard broadcast application for nighttime operation submitted by WAIT Radio. On January 24, 1968, the Commission denied the applicant's petition for reconsideration. The applicant appealed to the United States Court of Appeals for the District of Columbia. On June 24, 1969, that Court remanded the case to the Commission for further consideration.[2] The Court did not rule on the substantive contentions of the parties, but rather, directed the Commission to give the merits of the proposal a "hard look" and ". . . state its basis for decision with greater care and clarity than was manifested on its disposition of WAIT's claims . . ."[3] In line with that decision, this Commission invited any new evidence the parties might wish to submit, and on February 9, 1970, WAIT Radio and the intervenors were afforded the opportunity to argue orally before the Commission *en banc*. After fully reconsidering the submitted briefs and documents[4] and hearing oral argument, we have reached the same result as we did in our original Memorandum Opinion and Order. We find no compelling reasons to grant a waiver of our rules[5] and

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[2] See WAIT Radio v. FCC, U.S. App. D.C. , 16 RR 2d 2107 (1969).

[3] Id. at 2111, 2113.

[4] In addition to considering the original documents submitted by the parties, the Commission also received and carefully reviewed supplementary engineering statements from WAIT Radio on January 29, 1970, and April 1, 1970, and on behalf of WBAP/WFAA on March 9, 1970.

[5] The Commission has been given broad discretion in determining whether its rules should be waived. *Buckley-Jaeger Broadcasting Corp.* v. *F.C.C.*, U.S. App. D.C. , 397 F.2d 651 (1968).

we have attempted to articulate carefully the reasons for our decision.

2. WAIT Radio is the licensee of standard broadcast (AM) station WAIT, Chicago, Illinois, and operates daytime only on 820kc with 5000 watts of power. On March 7, 1967, WAIT tendered an application with the Commission requesting permission to operate on 820kc at night with a power of 10,000 watts using a directional antenna system. 820kc, however, is a Class I-A clear channel frequency and only one station, under Section 73.25, is authorized to operate on this channel at night in North America. This nighttime operation was conducted on a share-time basis by stations WBAP and WFAA, Fort Worth/Dallas, Texas.[6]

3. In addition to requesting a waiver of Section 73.25, the applicant requests a waiver of Sections 73.21 and 73.182 which establish technical specifications for operation on the clear channel. WAIT also contends that Section 73.24(b)(3), which precludes the acceptance of an application for nighttime facilities if objectionable interference would result to an existing station, or if the proposed operation would fail to provide service to at least 25 percent of an area or population which is without nighttime primary standard broadcast service,[7] does not apply to its proposal.

4. WAIT Radio contends that a denial of its proposal would result in the "waste of a scarce communication resource" and would thereby violate the Communications

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[6] A. H. Belco Corporation (WFAA) (BML-2312) and Carter Publications, Incorporated (WBAP) (BML-2313) on March 2, 1970, and March 5, 1970, respectively, filed petitions to modify their licenses. WFAA requested authorization to broadcast fulltime on 570kc and WBAP requested authorization to broadcast fulltime on 820kc. These requests were approved by Commission action April 22, 1970.

[7] The term "unserved" area is used herein to describe an area or population which is without nighttime primary standard broadcast service.

Act; and that a total silencing of a station, instead of a partial silencing, to avoid station interference, results in the kind of "overbreadth" regulation which is barred by the First Amendment. In support of these claims and in its request for waiver, WAIT alleges: i) that with its proposed new directionalization facilities, co-existence on the 820kc channel is completely feasible and causes no interference to any "unserved" area within the 0.5 mv/m-50% skywave contour of the dominant ClassI-A Texas stations;[7a] ii) that WAIT's "quality" programming is needed at night in the Chicago area; iii) that Section 73.24(b)(3)(ii) which requires new nighttime operations to serve 25 percent "unserved" area or population does not apply to WAIT's proposal for nighttime authorization on a clear channel.

5. Oppositions were filed by the Clear Channel Broadcasting Service, a trade organization, Midwest Radio-Television, Inc. (WCCO, Minneapolis), and WBAP/WFAA, Fort Worth/Dallas, Texas. The essence of these oppositions was that WAIT's proposal would cause widespread interference within the 0.5 mv/m-50% skywave contour of the Fort Worth/Dallas station and beyond it; that the object of the application, to add service to an urban center already well served at the expense of underserved areas, was contrary to Commission allocation goals and "unserved" area requirements; that WAIT's proposal would cause interference, though not recognized by Commission rules, to adjacent channel station WCCO, 830 kc, in Minneapolis; and that WAIT's programming is not unique and should not be regarded as a valid basis for waiver of these rules.

[7a] Throughout the above text, it has been assumed that if 820kc were authorized for nighttime duplication, a new station would protect the 0.5 mv/m-50% nighttime skywave contour of the dominant station. This was required of all Class II-A stations authorized to operate nighttime on the duplicated clear channels. It should be pointed out, however, that the present rules protect WBAP/WFAA from any interference on 820kc, regardless of whether it is within or beyond the 0.5 mv/m-50% secondary service area.

6. At the outset, two important grounds of possible misunderstanding should be carefully clarified: i) the applicant in this case does not attack the Commission's Clear Channel Rule Making or its underlying policies. It admits, by virtue of its waiver request, that its proposal violates those rules, but claims that its proposal is unique and therefore warrants a waiver; ii) the Commission does not disagree with, and will, therefore, not contest the applicant's constitutional analysis of "overbreadth" regulation and its First Amendment implications.[8] We strongly disagree, however, with the applicant's allegations that denying waiver in this case would constitute such an "overbreadth" of regulation.

7. Since we are not here concerned with the basic policy considerations underlying our clear channel rules,[9] it serves no purpose to trace and explain their development in detail. Basically, these rules are designed to keep certain internationally established frequencies under strict regulation at night. In our last rule making, which was concluded after 15 years of study,[10] we decided that 13 of the 25 clear channels should be duplicated at night. Two of the important requirements, *inter alia*, which the new station on the duplicated clear channel had to comply with were that it protect the dominant station from interference and that it serve 25 percent "unserved" area or population. We will return to the significance of this second requirement, *infra*.

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[8] In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227 (1943), the Court held that a valid denial under the "public interest" standard of the Communications Act does not violate the First Amendment. The real issue is whether the rejection of WAIT's application was reasonable and consistent with the provisions of the Communications Act.

[9] The determinations reached in the Clear Channel proceeding have been reviewed and upheld. The *Goodwill Stations, Inc.* v. *F.C.C.*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).

[10] See *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565 (1961), reconsideration denied, 24 RR 1595 (1962).

The applicant's basic claim is that although its nighttime proposal will cause interference to Class I-A station WBAP/WFAA in a crescent area which is populated by approximately 2,000,000 people, and within the 0.5 mv/m-50% skywave contour of the Texas stations, none of the crescent area is served by less than two nighttime aural services.[11] Therefore, the applicant concludes, its proposal does not conflict with the Commission's clear channel policy, which is to preserve nighttime signals for service to areas without standard broadcast service. What the applicant, in effect, is saying, is that although it will not promote our policies, it will also not infringe upon them. Even assuming for a moment that the latter statement were true, failure to hinder a policy hardly constitutes sufficient reason to grant a waiver.[12] However, the applicant's proposal would, in fact, serve to undercut the Commission's rules. If clear channels are going to be duplicated, and duplicated according to our rules on a systematic and controlled basis,[13] then most assuredly the public interest will not be served by authorizing another nighttime station in Chicago. In fact, in so doing, we would be preventing possible eradication of

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[11] The applicant's engineering studies show that all of the crescent area is served by at least two nighttime aural services—this takes into account both AM and FM services. The applicant's supplemental engineering statement shows that most of the crescent area is served by at least three or four stations.

[12] The argument is negative at best. WAIT's proposal not only fails to serve "unserved" area but a grant of its proposal not only remove service from the interference area and add a service to the populated Chicago metropolitan area.

[13] As the Commission concluded in the *Clear Channel* case, to serve the public interest, a breakdown of the clear channels must be on a carefully controlled basis, one which gives a measure of protection to skywave service on the channel and which assures that new service will be located in presently underserved areas and not in metropolitan centers already receiving a large number of signals. See Section 73.22(a) which assigns those clear channel frequencies which have been "broken down" to such States as Utah, Wyoming, New Mexico, *et al.*

"unserved" area in other states. For example, the Commission has under consideration a petition for rule making to allow nighttime duplication on frequency 820kc tendered by station WDAE, Ellsworth, Maine. The Maine proposal woud serve, within its 2.56 mv/m nighttime interference-free contour, 50.5 percent area and 26.6 percent population which is without nighttime primary standard broadcast service. The normally protected contour for a Class II-A station is 2.5 mv/m, which means that the Maine proposal would be highly efficient.[14] According to our studies, a grant of the WAIT proposal would mean that WDAE's proposed service contour would be decreased to its 6.36 mv/m contour and would thereby result in a substantial loss of service to the area and population which is without nighttime primary standard broadcast service.

8. The above example illustrates why the Commission has designated certain frequencies for controlled allocation. This would assure that when and if stations are allocated on these channels, they will be used to maximum efficiency.[15] The applicant operates under the misapprehension that its "quality" programming to listeners in the Chicago area, so long as it does not interfere with an existing sta-

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[14] The WAIT proposal would fail to serve 30.7 percent of the population and 80.5 percent of the area within its 2.5 mv/m normally protected nighttime contour.

[15] Counsel for both WBAP/WFAA and WAIT Radio have submitted opposing petitions on the merits of "super power". In our original decision of the WAIT proposal, we noted that at the present time eight proposals by Class I-A stations for temporary (developmental) operation with power in the order of 500 or 750kw have been tendered but not accepted for filing. Also tendered are several petitions for and against "super power" operation and a request that the rules be amended to permit power in excess of 50kw in the AM band. The Commission still maintains that clear channel 820kc should remain unduplicated at night until studies are concluded with regard to the feasibility of higher power. See our Memorandum Opinion and Order, Docket 6741 (FCC 62-1214, 24 RR 1595) released November 28, 1962, in par. 45 relating to the 820kc channel.

tion's service to "unserved" area, is in the public interest, and a denial of its proposal a misapplication of licensing authority under the Communications Act and an "overbreadth" of regulation and abridgement of First Amendment rights. The argument is unpersuasive. The severe congestion which exists on other frequencies because of the liberal allocation procedures of the past have been avoided on the clear channels through strict adherence to important technical and policy considerations underlying those rules.

9. The foregoing is not intended to suggest that our rules are sacrosanct. However, the Court of Appeals, in its remand order, clearly stated:

> "Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.' *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, U.S. App. D.C. , 406 F.2d 664 (1968)." [16]

The applicant simply has not presented facts which warrant a waiver of those rules. Chicago can hardly be thought of as having a dearth of AM and FM facilities.[17] A grant of this proposal would result in a severe and undesirable erosion of our clear channel rules. Since the Commission's authority in this area is well established, and its actions are pursuant to the policies and rules established after long years of study and consideration, a denial of the applicant's proposal on these grounds is in the public interest, within the ambit of the Communications Act of 1934, as amended, and not an "overbreadth" of regulation which restricts constitutional rights under the First Amendment.

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[16] *Supra* at note 2 at 2112, U.S. App. D.C. (1969).

[17] The general Chicago area has 25 AM and 16 FM stations.

10. In addition to the interference caused within WBAP/WFAA's secondary service area, a grant of WAIT's proposal would also cause interference, both beyond WBAP/WFAA's nighttime 0.5 mv/m-50% skywave contour, and well within the secondary service area of WCCO, a Class I-A station on adjacent clear channel 830kc, and WGY, a Class I-B station on adjacent channel 810kc. WAIT points out that this interference does not violate the rules and that the interference caused beyond WBAP/WFAA's nighttime skywave contour is in areas which already have a multiplicity of Class I skywave signals.

11. When an applicant requests a waiver of the rules which have been promulgated in the public interest, all factors become relevant to that interest. Almost all new allocations for AM stations will cause some interference not recognized as objectionable under our rules. This does not mean, however, that the Commission considers it desirable to permit such interference. It only means that we have sacrificed optimum broadcast standards in order to serve other aspects of the public interest. This has been evidenced in our preference for proposals which would be first local outlets or which would serve a substantial amount of area which was without nighttime primary standard broadcast service. In virtually all of these allocations, some interference, not objectionable under our rules, yet ideally undesirable, is allowed in order to serve the public interest. However, the Commission has recently refused to waive its rules to accept applications for nighttime facilities which would not serve 25 percent "unserved" area or population or provide other overriding public benefits.[18] Since each

[18] e.g., *Washington Broadcasting Co., Inc.*, 18 RR 2d 160, 20 FCC 2d 1094 (1970) (KREN, Renton, Washington); *WGBA, Inc.*, 18 RR 2d 352, 21 FCC 2d 493 (1970) (WHYD, Columbia, Georgia). Also see *560 Broadcast Corp.* v. *FCC*, 8 RR 2d 1134 (1966) *Petition for reconsideration denied*, 14 RR 2d 404 (1968), Commission *affirmed*, U.S. App. D.C. , F.2d , 17 RR 2d 2054, (D.C. Cir.) (1969).

new signal causes some unrecognized interference, we have adhered to this policy in order to prevent further degradation of AM service on already congested channels.

12. Although we are not now faced with the congestion on the channel 820kc, an ultimate grant of the WAIT proposal would impede future allocations on the channel should we conclude that such authorizations would be in the public interest. Moreover, as indicated above, in addition to the interference caused within and beyond WBAP/WFAA's 0.5 mv/m-50% nighttime skywave contour, a large area would also lose reception of WCCO and WGY signals where they are not protected from interference under our rules. This loss of service, in order to provide Chicago with another AM nighttime service in addition to the 25 already there, simply is not in the public interest.[19]

13. The applicant has also questioned the applicability of Section 73.24(b)(3).[20] WAIT points out that near the time Section 73.24(b)(3) was adopted, the Commission unambiguously stated:

> "We do not consider here the question of nighttime operation on Class I-A channels. This is an entirely separate problem involving non-engineering considerations." See Docket No. 6741.[21]

14. However unambiguous the above language may be, it is clearly not intended to preclude application of Section 73.24((b)(3) to WAIT's proposal. At the time this section

[19] Deprivation of a recognized but unprotected signal is a valid consideration in reaching a conclusion on the question of the public interest. See *Interstate Broadcasting Co., Inc.* v. *FCC*, 25 RR 2046, 116 U.S. App. D.C. 327, 323 F.2d 797 (D.C. Cir. 1963).

[20] For provisions of this section, see paragraph 3, *supra*, at page 2.

[21] See *In the Matter of Amendment of Part 3 of the Commission's Rules Regarding AM Station Assignment Standards*, etc., 25 RR 1615 at 1631, fn. 37 (1963).

was adopted, there was no reason to consider the question of nighttime operation on Class I-A channels.[22] First, except for those channels selected for nighttime duplication, our rules prohibited new nighttime operations on the Class I-A clear channels altogether. Second, Section 73.22 required Class II-A stations, which were authorized to duplicate nighttime service on 13 of the 25 selected Class I-A channels, to serve 25 percent "unserved" area or population and protect the dominant existing station from interference at its 0.5 mv/m-50% nighttime skywave contour. Therefore, in order to avoid confusion and unnecessary repetition, Section 73.24(b)(3) was specifically made inapplicable to Class II-A stations. However, it does not follow that its requirements are not applicable to WAIT. According to Sections 73.21 and 73.22, Class II-A is the classification given to those stations assigned to the Class I-A clear channels which were specifically authorized for nighttime duplication. Since WAIT is not requesting authority to operate on one of these channels, it is not, by definition, a Class II-A station and, therefore, is not exempt from the requirements of the rule.[23]

15. The applicant also argues that, in any event, Section 73.24(b)(3) could not constitutionally bar its application. The applicant alleges that the rule was intended to deal with interference problems due to severe congestion on certain frequencies and that this problem does not exist on

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[22] Apparently, the Court viewed the applicability of Section 73.24(b)(3) as superfluous. Footnote 2 of the opinion reads as follows: "The pertinent rules are found in 47 C.F.R., Sections 73.21, 73.25, 73.182(a)(l)(i), and 73.182(w) (1968). While Section 73.24, C.F.R. Sect. 73.24 (1968) is also involved, it would seem that in the context of this application for waiver, it adds nothing . . ."

[23] Even if WAIT were classified as a Class II-A proposal, it would still be required to serve 25 percent "unserved" area or population and protect the 0.5 mv/m-50% nighttime skywave contour of the dominant station under Section 73.22.

the clear channels. With regard specifically to the "unserved" area requirement, the applicant argues that application of this part of the rule to its proposal results in the Commission's pursuing self-contradictory policies. WAIT contends that even if an applicant proposed to serve 25 percent "unserved" area, its application would be denied on the grounds that service to "unserved area is reserved for the existing clear channel.

16. The above arguments are without merit. It is true that the requirements of this rule were designed to control the unnecessary congestion caused by skywave to groundwave interference without at least some countervailing public benefit. However, our clear channel policy to regulate nighttime authorizations has been upheld, and, not coincidentally, these rules required that new stations on the duplicated channels serve 25 percent "unserved" area even though there was no immediate fear of congestion. In our 1964 Report and Order,[24] initiating the "go-no go" policy and establishing the "unserved" area requirements for new nighttime operations, we carefully noted that each new signal added on a channel tends to increase the probability of interference not recognized as objectionable under our rules. This is no less true on the clear channels. In fact, our basic policy to regulate future allocations on the Class I-A channels on a controlled basis was adopted primarily because of this incremental interference caused by new nighttime allocations. Specifically, interference in this case would be caused not only within the secondary service area of the Class I-A facility in Texas, but also far beyond; strong signals would also result in vast areas where interference would occur should we subsequently consider additional nighttime operations.

17. The applicant's argument that the Commission is pursuing self-contradictory goals is also unpersuasive. See-

[24] See 2 RR 2d 1658 (1964).

tion 73.24(b)(3) has relevance to a new proposal on a clear channel only if the Commission waives the clear channel rule which precludes new proposals at this time. To argue that they are mutually exclusive and contradictory, however, is incorrect.

18. Finally, the requirements of Section 73.24(b)(3) do not constitute an abridgement of free speech or waste of a communications resource, but rather, maintain, in the public interest, an intelligent plan of conservation. Our intention to "freeze" specific clear channels in order to preserve for future allocation those proposals which will serve the public in areas that are without primary standard broadcast service is clearly not an "overbreadth" of statutory regulation.[25] The example of what effect a grant of WAIT's proposal would have on the efficiency of the Maine proposal, *supra* at page 4, should it be granted, clearly illustrates the wisdom of applying strict rules today in order to serve the public interest tomorrow. A grant of this proposal in an area that is replete with aural broadcast service is not in that interest.

19. Since only the technical aspects of the clear channel policy have been dealt with, some mention should be made of the applicant's claim of "unique" and "quality" programming and its relevance to a waiver request. First, it does not appear that the applicant's programming format is so unique that at least one or two of the AM or FM serv-

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[25] In a *per curiam* decision on June 30, 1967 (Case No. 20,527), the U.S. Court of Appeals for the District of Columbia affirmed a Commission denial of a proposal from KXA, Inc., Seattle, Washington, to operate with increased power daytime on nighttime clear channel 770kc. See *KXA, Inc.*, 5 RR 2d 338 (1965), *petition for reconsideration denied*, 5 FCC 2d 60, 8 RR 2d 723 (1966). We noted in our opinion that further assignments for daytime only stations would tend to degrade the channel and hinder later assignment to fulltime stations.

ices in Chicago does not provide a reasonable facsimile.[26] However, notwithstanding the presence or absence in Chicago of WAIT's particular programming format, programming is usually not given particular consideration in reviewing allocation requests.[27]

20. Just recently[28] this Commission denied a nighttime proposal in Jacksonville, Florida, which violated our old 10 percent rule prohibiting a station from receiving interference to more than 10 percent of the population within the station's proposed normally protected primary service area. The applicant's request for waiver of the 10 percent rule in order to operate nighttime was based on a showing of need to allocate a second Negro-oriented operation. We found, however, that the six (6) nighttime stations in Jacksonville, including the one Negro-oriented station, were responsive to the needs and interests of the Negro community. More important, however, we found that authorization of the applicant's proposal might preclude future allocations of stations in areas with greater need for broadcast service.

21. Although programming is not irrelevant to consideration of a waiver request, the "... greatest weight must be

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[26] At oral argument on February 9, 1970, Mr. Maurice Rosenfield (managing partner of WAIT), responding to Commissioner Wells' question of what is quality music, said that WAIT plays "... what is generally considered to be the higher case level type of music in the Chicago area—principally semi-classics, Broadway show music; not fully classical, but just below that." Our studies show that there are no less than four (4) FM stations in Chicago and the suburban area which list semi-classical or Broadway showtunes as part of their programming format.

[27] See *Buckley-Jaeger Broadcasting Corp.* v. *F.C.C.*, U.S. App. D.C. , 397 F.2d 650 (1968); *WBEN, Inc.* v. *United States*, 396 F.2d 601, 622 (C.C.A. 2 1968); *James S. Rivers* v. *F.C.C.* 122 U.S. App. D.C. 29, 351 F.2d 194 (1965), all upholding Commission actions denying waiver requests based on program considerations.

[28] *Mel-Lin, Inc.*, 18 RR 2d 787, (1970), petition for reconsideration filed April 20, 1970. See also *Semrow Broadcasting Co.*, 7 RR 2d 645, 652 (1966) (Commissioner Cox concurring).

given to the enduring allocation characteristics of a proposal rather than to the generally transitory programming to be carried out." [29] WAIT's programming proposal not only fails to be unique, but would cause interference, in violation of our rules, within the secondary service area of WBAP/WFAA, Fort Worth/Dallas, Texas. WAIT's proposal also would cause interference beyond the 0.5 mv/m-50% nighttime skywave contour of WBAP/WFAA. Moreover, WAIT's proposal, if granted, would tend to degrade the 820kc channel and thereby reduce the possibility of locating stations, at some future date, in areas that may have greater need for nighttime aural broadcast service. In fact, we have already pointed out that WAIT's proposal would substantially reduce the service to "unserved" area of a proposal to operate on 820kc in Maine. Under these circumstances, the transitory nature of programming is clearly outweighed by the adverse effects of a grant of WAIT's proposal would have on future allocations.

22. In view of the foregoing, we find that the applicant has failed to present sufficient reasons, if true, to justify a waiver. Under these circumstances a hearing is not necessary. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 13 RR 2161 (1956).

23. Accordingly, It Is Ordered, That the request for waiver Is Denied, the application is not acceptable for filing, and the petitions to dismiss Are Rendered moot.

Federal Communications Commission

Ben F. Waple
Secretary

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[29] *Mel-Lin, Inc.*, 18 RR 2d 787, 793 (1970).

APPENDIX E

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

[Caption omitted in printing]

Memorandum Opinion and Order

Adopted: September 30, 1970. Released: October 5, 1970.

By the Commission: Commissioner Wells absent.

1. On March 7, 1967, WAIT Radio (hereinafter "WAIT") tendered an application with this Commission requesting authorization to change its existing operation from a daytime-only to an unlimited-time standard broadcast station. Since the applicant's proposal violated certain technical rules, its application was accompanied by an appropriate request for waiver. In its most recent decision of May 6, 1970, 22 FCC 2d 934, the Commission denied, for the third time, WAIT's request for waiver of those rules.[1] Now before the Commission is a petition for reconsideration of this Memorandum Opinion and Order.[2] Although it is superfluous to wrestle with arguments carefully considered in our last opinion, in view of the applicant's persistent endeavor to obtain nighttime authorization, we feel disposed to respond briefly to old arguments cast in a somewhat different light.

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[1] This denial followed remand by the Court of Appeals for the District of Columbia Circuit, *WAIT* v. *FCC*, 418 F2d 1153 (D.C. 1969) and oral argument before the Commission *en banc* on February 9, 1970.

[2] The Commission also received and considered responsive pleadings on behalf of Carter Publications, Inc., licensee of standard broadcast station WBAP, 820kc, Fort Worth-Dallas, Texas, Clear Channel Broadcasting Service and Midwest Radio-Television, Inc.

2. Since 1967, WAIT has petitioned this Commission for authority to operate nighttime on channel 820kc—a clear channel, which under section 73.25 of our rules is reserved for only one nighttime standard broadcast operation and which is now occupied exclusively by WBAP, Dallas, Texas. Without directly challenging the validity of the clear channel rules, WAIT has persistently contended that acceptance of its proposal would not undercut the policy which those rules were intended to promote. Basically, the applicant has shown that notwithstanding the interference its nighttime operation would cause within WBAP's 0.5 mv/m-50% skywave contour, this interference would occur in an area which already receives primary aural service from two or more stations. The applicant concludes that since this interference does not occur in an area which receives a meaningful signal from station WBAP, to deny it access to the airways is an "overbreadth" of regulation which abridges its constitutionally protected right of free speech under the First Amendment.

3. WAIT interprets the Commission's most recent decision as reflecting a primary concern for future flexibility in allocating stations on 820kc. Based on this constrained interpretation, WAIT now offers to accept a waiver of our rules conditioned upon a final Commission order, at any time in the future, breaking down the 820kc frequency as a clear channel.

4. Our prior disposition not to accommodate WAIT by granting its request for waiver did not rest exclusively on the fear that we would lose our flexibility in possibly allocating future stations on 820kc. We also discussed, at length, WAIT's failure to show how a waiver of section 73.24(b)(3)(i) and (b)(3)(ii) of our rules would be in the public interest. Section 73.24(b)(3)(i) requires that a proposal not cause objectionable interference to any existing station, and 73.24(b)(3)(ii) requires that a new nighttime proposal serve 25 percent of an area or population which is without standard broadcast service.

5. As previously noted, WAIT contends that the interference it will cause within WBAP's 0.5 mv/m-50% skywave contour is in an area which is not only served by several other aural facilities, but in an area in which "the evidence shows that no one listens to WBAP. . . ." First, it should be pointed out that WAIT's contention that there is no evidence of a listening audience is not left completely unrebutted. At oral argument before the Commission on February 9, 1970, counsel for WBAP did contend that WBAP received most of its out-of-state entries from a station contest from the State of Illinois.[3] Nevertheless, none of the parties proffered particularly persuasive evidence regarding audience listening habits in the crescent area of interference and, therefore, the Commission's decision is not predicated on the contentions of any party regarding this issue.

6. More important is the misconstruction WAIT has made of our clear channel rules. Since channel 820kc is an unduplicated clear channel at night, interference to its operation is not limited to the 0.5 mv/m-50% skywave contour. WAIT, however, completely glosses over the interference its operation would cause beyond the 0.5 mv/m-50% skywave contour. In addition, as discussed in our last decision, adjacent channel interference, though not recognized as objectionable under our rules, is a relevant consideration in determining what is in the public interest. The applicant, in its petition for reconsideration, not only excepts to our emphasis of the *Interstate* case,[4] but most interestingly, claims that WBAP, WCCO, and WGY, not a

[3] See record of oral argument at page 26. Counsel for WAIT contended at oral argument that an American Bureau of Research survey showed there was no listening and "over two thousand regular logs have shown one incident of listening to WFAA-WBAP in this range." *Id.* at p. 8.

[4] See *WAIT Radio* v. *FCC*, 22 FCC 2d 934, 938-939, footnote 20 (1970).

party to this case, have not shown special circumstances or a listening audience which would warrant taking account of service beyond the protected area.[5] It seems that the applicant has misconceived its role in this proceeding. It is not WBAP or WCCO who are seeking a waiver of the Commission's rules, but rather, WAIT Radio. The Circuit Court of Appeals for the District of Columbia, in remanding this case to the Commission, very clearly reaffirmed the position taken in *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, in which the Court said that when an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.[6] It is WAIT which has the burden of showing why it would be in the public interest to waive tested rules and established policies.

7. In addition to our concern for maintaining flexibility over possible future allocations on 820kc and with the interference WAIT's proposal would cause to existing stations, we also fail to find any public interest factors present to warrant a waiver of section 73.24(b)(3)(ii) which requires service to 25 percent of an area or population which is without standard broadcast service. The applicability of this section was discussed thoroughly in our last opinion. The applicant contends, however, that the Commission acknowledged its inapplicability because a clear channel was involved. This contention is grossly incorrect. In referring to certain language in Docket No. 6741, we explicitly said that "however unambiguous the above language may be, it is clearly not intended to preclude application of Section (73.24b)(3) to WAIT's proposal."[7] We here incorporate by reference our previous discussion regarding the applicability of that section.

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[5] See petition for reconsideration at page 7, footnote 4.

[6] *WAIT Radio* v. *Federal Communications Commission*, 16 RR 2d 2107, 2112 (1970).

[7] *Supra* at footnote 5 at 939.

8. The applicant evidently contends that, in any case, the Commission has not dealt accurately with the issues or facts of underserved areas. WAIT argues that America is an urban society and, therefore, metropolitan areas are evidently more in need of aural broadcast than sparsely populated rural areas. Without commenting on the merits of this contention, the Commission only notes that such argument is misplaced since it questions the wisdom of preserving section 73.24(b)(3)(ii) rather than waiving its applicability. The proper forum for considering rule changes is in the broad context of a rule-making proceeding.

9. The basic thrust of the applicant's petition for reconsideration is that the clear channel rules and section 73.24 (b)(3) may be waived since WAIT is now willing to accept a waiver conditioned on the Commission's decision, sometime in the future, to duplicate service on 820kc. WAIT has misconstrued not only the burden which it has in obtaining a waiver of our rules, but the reasons for our refusal to waive as well. The Circuit Court of Appeals clearly stated that "presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule."[8] What WAIT now requests is that this Commission grant a waiver until such time as we find a more suitable applicant. It is not so much the precedential impropriety of granting a conditional waiver which is of major concern to this Commission, but rather, the almost unimaginable consequences of doing so without a concomitant showing that such action is in the public interest.

10. In determining that public interest, we have been confronted with balancing the need to authorize a new nighttime service in the Chicago metropolitan area[9]

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[8] *Supra* at footnote 7.

[9] In our last decision, we noted that there were 25 AM and 16 FM stations in the general Chicago *area*, and *not in Chicago*, to which reference the applicant, in its latest petition, attributes Commission error.

against the waiving of our rules without convincing evidence that such action is in the public interest. In our last decision, we found that WAIT's proposal would in no way promote the policies underlying our rules, because WAIT's proposed nighttime operation, in addition to causing interference to the existing service of three stations, would not be unique or serve unserved areas or population. We found, therefore, that waiver of our rules to permit the addition of still another ordinary nighttime service to the multiplicity of such services already available in the Chicago area would not be in the public interest. WAIT's offer to accept a conditional grant does not go to these public interest findings, but only to the narrower reasoning which it erroneously ascribes to the Commission.[10]

11. WAIT seeks to invoke the overbreadth principle of First Amendment cases contending that "free speech cannot be silenced merely because it fails to support a Commission policy." Although this contention is difficult to fault in the abstract, it falls far short of reality when viewed in the concrete. The goal of the Commission's allocation policy throughout the years has been to permit the maximum efficient use of spectrum space consonant with sound engineering standards, and thus foster rather than impede the exercise of free speech. While maintaining a rational system of allocations, we have managed as a result to assign 4,300 stations—or approximately 40 percent of the entire world's standard broadcast stations—within a 107 channel band. In order to sanction the operation of this many stations, it was necessary to prohibit about 2,000

[10] We note that making a conditional grant to permit establishment of a new service which may later be withdrawn is not without difficulty. As we said in our *Second Report and Order (CATV)* in Docket No. 14895, etc., 2 FCC 2d 725, 782, "once entrenched, it is difficult, if not wholly impracticable in the light of the disruption [to the public] which would result, to take effective action or to attempt to roll back the situation . . ."

of these facilities on a controlled basis from operating at night. To do otherwise would have inevitably resulted in fewer usable signals reaching the listening public because of the intolerable demands which would have been placed on the already critically congested nighttime band. We believe that this employment of controlled frequency allocation viewed realistically can hardly be equated with restraints upon free speech. For as long as there are substantially more individuals who want to broadcast than there are frequencies to allocate, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co., Inc., et al.* v. *F.C.C.*, 395 U.S. 367, 388 (1969).

12. In view of the foregoing, the Commission finds that WAIT has failed to show unique or extraordinary circumstances which would justify a waiver. Accordingly, It Is Ordered, that the petition for reconsideration Is Denied.

Federal Communications Commission

Ben F. Waple
Secretary

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Supreme Court, U. S.
FILED
OCT 10 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-398

WAIT RADIO,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF FOR CARTER PUBLICATIONS, INC. MIDWEST RADIO-TELEVISION, INC. AND CLEAR CHANNEL BROADCASTING SERVICE IN OPPOSITION

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October 9, 1972

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 459 F.2d 1203 (1972). The opinions of the Federal Communications Commission (Pet. App. 16a-37a) are reported at 22 F.C.C. 2d 934 (1970) and on reconsideration, 25 F.C.C. 2d 1016 (1970).

JURISDICTION

The jurisdiction of this Court is adequately set forth in the petition for a writ of certiorari.

QUESTION PRESENTED

The question presented is properly set forth in the brief for the Federal Communications Commission in opposition.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The constitutional and regulatory provisions involved are properly set forth in the petition for a writ of certiorari. The relevant rules of the Federal Communications Commission are appended to the brief for the Federal Communications Commission in opposition.

STATEMENT OF THE CASE

Petitioner WAIT Radio operates an AM radio station licensed to broadcast during daytime hours in Chicago, Illinois, on the clear channel 820 khz, on which WBAP, Fort Worth Texas, is the only station authorized to operate at night.[1]

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[1] Clear channel stations have been authorized in response to the unique characteristics of nighttime broadcast emissions. Broadcast signals at all times travel along the earth's surface, diminishing in intensity with distance, and the effective range of a "groundwave" signal is the same at night as in the day. However, broadcast signals also travel upward into the atmosphere. During the day, the sun causes these "skywave" emissions to be absorbed and lost, but at night, they are reflected by layers of the upper atmosphere back towards the earth, where they can be received at great distances from the point of origin, provided no other signal interferes. Where such

(Footnote continued on next page)

In 1967, the station applied to the Federal Communications Commission for authorization to broadcast at night on 820 khz. Under its proposal, WAIT Radio would provide the City of Chicago with its 26th nighttime broadcast service. To do so, WAIT would deprive more than two million persons residing in a vast and relatively underserved area running from Kentucky to South Dakota of skywave service from WBAP (Pet., 2 pp. 9a and 11a).[2] In addition, there would be a loss of service from clear channel stations WCCO, Minneapolis, Minnesota, and WGY, Schenectady, New York, which operate on adjoining clear channels (Pet., app. pp. 9a and 12a).

Intervenors, Carter Publications, Inc., the licensee of station WBAP, Midwest Radio-Television, Inc., the licensee of station WCCO, and the Clear Channel Broadcasting

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(Footnote one continued from page two)

interference exists, no signal can be received on the frequency. Consequently, more stations can operate free of mutually destructive interference on the same frequency during the daytime than at night.

The Commission has determined that the unique characteristics of nighttime broadcast emissions provide a means of ensuring some service to remote underserved areas and has reserved twelve frequencies, including 820 khz, for exclusive nighttime use by one clear channel station on each frequency. *See Report and Order on Clear Channel Broadcasting in the Standard Broadcast Band,* 31 FCC 565 (1961), reconsideration denied, 24 RR 1595 (1962), aff'd sub nom., *The Goodwill Stations, Inc. v. FCC,* 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). As a result, WAIT and the other stations authorized to operate on 820 khz are required to cease operating at night.

[2] WAIT Radio is correct (Petition, p. 3) that skywave signals, because they are subject to atmospheric conditions, are less reliable than groundwave signals. However, in the area in which the WAIT nighttime signal would interfere with WBAP, the WBAP signal is of listenable quality. See *AM Station Assignment Standards,* 2 Pike & Fischer RR 2d 1658, 1663 (1964).

Service, an organization representing clear channel broadcast stations throughout the country, all participated in the FCC's proceedings and urged rejection of the WAIT proposal.

The Commission initially dismissed the WAIT application as unacceptable for filing on the ground that it conflicted with the Commission's clear channel rules as well as the Commission's rule against new nighttime authorizations on *any* frequency which would not result in a new service to an area without existing service ("white area").[3]

WAIT Radio appealed to the United States District Court for the District of Columbia Circuit which without reaching the merits, reversed the Commission on the ground that the Commission had not given the WAIT proposal a "hard look". *WAIT Radio v. FCC,* 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969) (Judge Danaher dissenting). Thereafter, the Commission permitted WAIT Radio to submit further evidence in support of its proposal and heard oral argument but again rejected the WAIT application as inconsistent with the Commission's broadcast allocation policies. 22 FCC 2d 934, reconsideration denied, 25 FCC 2d 1016 (1970). WAIT Radio again appealed to the United States Court of Appeals for the District of Columbia, which this time affirmed the Commission's determination. *WAIT Radio v. FCC,* 459 F.2d 1203 (1972).

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[3] The latter rule, 47 CFR 73.24(b)(3), was adopted after the Commission determined that the AM spectrum was already oversaturated. The rule was designed to freeze further nighttime authorization except where the new authorization would provide a first AM service to a substantial area or population. *AM Station Assignment Standards, supra.*

ARGUMENT

WAIT claims that the FCC's denial of its request to operate at night must be equated with a denial of its First Amendment rights. According to WAIT, such denial presents a need for "higher standards of rationality" (Pet., p. 8) on the part of the Commission and thus a "higher standard of judicial review" of the Commission's decisions (Pet., p. 10).

Whenever the FCC denies a broadcast application or limits the facilities with which a station operates, someone is silenced, in whole or in part, and the public is denied the applicant's voice. Indeed, the FCC was created in response to the need for effective limitation of broadcast voices.[4] Justice White has aptly observed: "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). Under Section 307(b) of

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[4] See Senate Report No. 772, 69th Cong., where in considering the Radio Act of 1927 (the predecessor of the Communications Act of 1934) the Committee on Interstate Commerce explained:

> "If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio."

the Communications Act of 1934, 47 U.S.C. 307(b), the Commission is charged with the responsibility to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

As shown in the FCC's Brief in Opposition, cases where the courts have upheld the Commission's denial of proposals for new broadcast service are legion.[5] Moreover, in order to permit WAIT to operate at night, the Commission would be silencing the reception of WBAP, WCCO, and WGY in the areas in which the WAIT signal would cause destructive interference.

Contrary to WAIT Radio's claim, however, the denial of a broadcast authorization based on engineering allocation policy does not present a Constitutional issue requiring a higher standard of judicial review.[6] Rather it merely

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[5] These cases also include numerous instances where the Commission was not faced with a choice between competing voices. See, e.g., *Henry v. FCC*, 302 F.2d 191 (C.A.D.C.), cert. denied, 371 U.S. 21 (1962).

[6] In *Brandywine-Main Line Radio, Inc. v. FCC* (C.A.D.C. Case No. 71-1181, decided September 25, 1972), the Court below applied a stricter standard of review in an FCC license case because of the presence of a First Amendment question. But that case is clearly distinguishable and presents no conflict with the Court's opinion in the instant case. In *Brandywine*, the Court upheld the FCC's denial of the renewal applications of two radio stations for violations of the Commission's "Fairness Doctrine" and personal attack rules, and for misrepresentations in the applicant's program proposals. The Court observed (slip. op. p. 71): "The most serious aspect of this case relates to the basic freedoms of speech and press which are essential guarantees of the First Amendment. This is the area of greatest concern to the Court. Any shortcomings in this area would

(Footnote continued on next page)

involves a question whether the Commission has properly discharged its "public interest" responsibilities under the Communications Act. As this Court observed almost 20 years ago:

> "The right of free speech does not include . . . the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience or necessity.' *Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.*" *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943) [emphasis added.]

More recently, the Court stated:

> "If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of

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(Footnote six continued from page six)

necessitate our reversing the decision of the Commission." In *Brandywine*, however, the FCC was faced with a licensee whose views were highly unpopular in the community and the Court was concerned with insuring that the FCC's decision was based on considerations other than its evaluation of those views. As Judge Wright stated in his concurring opinion (slip op. p. 93), it is "because the Commission's ruling has the possible effect of suppressing the ventilation of views with which there might be substantial disagreement, its action in denying renewal of the license requires particularly careful scrutiny . . . in such a case it is not enough simply to find that substantial evidence in the record, taken as a whole, supports the Commission and there was no abuse of discretion. In these circumstances, the Court itself should make its own evaluation of the evidence to insure that First Amendment freedoms of the licensee and the public are fully and fairly taken into account in the decision making process."

> them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 388-389.

Here, the commission has limited the WAIT "license so as not to overcrowd the spectrum." Of equal importance, the Commission's decision was necessary in order to preserve its basic allocation policy of providing service to underserved areas as well as its flexibility in meeting future allocation needs. And the Court below properly reviewed the Commission's decision under the long established judicial review criterion to determine if "the FCC exceeded its discretion in denying WAIT's application for authorization to broadcast during nighttime hours." *WAIT Radio v. FCC, supra,* 459 F.2d at 1204. The Court below concluded that it had no "warrant for saying that the Commission has failed on remand, to comply with our order that it take a 'hard look' at the matter and identify its reasoning" nor justification "for saying that the Commission's approach is either devoid of rationality, or is to be condemned as arbitrary and an abuse of discretion." 459 F.2d at 1210. No other standard of review is called for. See, *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1950).

CONCLUSION

For the foregoing reasons, WAIT Radio's petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 9, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-398

WAIT RADIO, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 459 F.2d 1203. The opinions of the Federal Communications Commission (Pet. App. 16a-37a) are reported at 22 F.C.C. 2d 934 and, on reconsideration, 25 F.C.C. 2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1972, and a petition for rehearing was

denied on April 26, 1972. On July 20, 1972, the Chief Justice granted an extension of time in which to file a petition for certiorari to and including September 8, 1972. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly affirmed the Commission's denial of a request for waiver of its clear channel and nighttime broadcast rules after finding that the Commission's action was not arbitrary, irrational, or an abuse of discretion.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech * * *."

STATEMENT

Petitioner is licensed to operate a daytime AM radio station on the 820 kHz channel in Chicago, Illinois. In 1967, petitioner applied to the Federal Communications Commission for permission to broadcast on the 820 kHz channel at night. This application of necessity included a request for waiver of the Commission's clear channel and nighttime broadcast rules, 47 C.F.R. 73.21, 73.22, 73.24(b)(3), and 73.25. The clear channel rules provide that certain channels,

including the 820 kHz channel, are each restricted to one nighttime broadcaster in the continental United States. These rules were promulgated to protect the signals of certain designated clear channels at night, so that radio service may be provided to remote areas which, because of their sparse population, cannot support local AM radio stations.[1] The additional nighttime broadcast rule provides that any station seeking new nighttime authorization must demonstrate, *inter alia*, that its signal will "provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area or at least 25 percent of the population residing therein." 47 C.F.R. 73.24(b)(3)(ii). The purpose of this rule is to limit additional broadcast interference on the saturated AM frequency band.

The Commission rejected petitioner's application, 10 F.C.C. 2d 481, reconsideration denied, 11 F.C.C. 2d 547, and the court of appeals remanded the case to the Commission for further consideration, 418 F. 2d 1153. On remand the Commission found that

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[1] The clear channel broadcasters are able to reach these remote areas at night via "skywave" signals which are reflected back to earth off layers of the upper atmosphere. Such signals are absorbed, and not reflected back, during the day. Nighttime broadcast duplication on a channel "dilutes the effective range of * * * skywave propagation to distant rural areas * * *" (Pet. App. 3a). See *Clear Channel Broadcasting*, 31 F.C.C. 565, affirmed *sub nom. The Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F. 2d 637 (C.A. D.C.).

waiver of the clear channel and nighttime broadcast rules on behalf of petitioner was not appropriate for several reasons, including the facts that (1) petitioner's proposed nighttime broadcast signal would cause substantial interference with the signal of the primary broadcaster on the 820 kHz channel over a large area with a population of more than two million, (2) its proposed signal would also cause interference with the signals of two broadcasters on the 810 kHz and 830 kHz channels, (3) petitioner's nighttime signal would not provide any significant population or area with a first primary AM service since there are already 25 nighttime broadcasters serving the population and area that would be reached by petitioner's nighttime signal, and (4) granting petitioner's request for waiver would hamper the Commission in making future allocations regarding nighttime broadcasting on the 820 kHz channel.

Petitioner sought reconsideration, offering to accept a conditional waiver of the rules under which it would agree to cease nighttime broadcasting upon a final Commission order authorizing another station to operate on the 820 kHz channel. The Commission again denied petitioner's application, determining that even a conditional waiver would to some extent impair the Commission's flexibility in dealing with future applications and holding that petitioner had in any event failed to establish that waiver of the clear channel and nighttime broadcast rules in its behalf would serve the public interest.

The court of appeals affirmed in an opinion which carefully reviewed the considerations which led the

Commission to deny petitioner's application and found that the Commission's denial was neither contrary to law nor an abuse of discretion.

ARGUMENT

As petitioner recognizes, "[t]he sole issue [before the Commission was] one of deciding whether on the facts presented the clear channel [and nighttime broadcast] rules should be waived in this specific case * * *" (Pet. 8). The Commission decided this issue adversely to petitioner. The court of appeals found that the Commission's decision was not contrary to law and was not arbitrary, irrational, or an abuse of discretion, and petitioner does not contest this finding. Petitioner urges (Pet. 7-11), however, that there are First Amendment considerations inherent in this case which require "closer judicial scrutiny and an insistence of higher standards of rationality" (Pet. 8). In effect, petitioner contends that a court, in approving a Commission decision respecting frequency allocation, must determine not only that the Commission's decision was within its statutory authority and had a rational basis in the record but also that the court itself would have reached the same decision. This contention, which overlooks the value of Commission expertise in frequency allocation matters, is contrary to the decisions of this Court.

This Court has long recognized that First Amendment considerations do not preclude effective regulation of the allocation of broadcasting frequencies. As

the Court stated in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 386: "Although broadcasting is clearly a medium affected by a First Amendment interest, * * * differences in the characteristics of new media justify differences in the First Amendment standards applied to them." The Court observed that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, at 388. This is necessarily the case, because there are simply too many persons desiring broadcast licenses and too few available frequencies.[2] "It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Id.*, at 389.

Congress has committed the task of "choosing from among the many who apply" to the Commission and has established the "public interest, convenience, or necessity" as the criterion for the exercise of its delegated authority. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. This Court has long held that this statutory standard is constitu-

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[2] In the presently congested AM band, approximately half of the more than 4,000 licensed broadcasters must go off the air at night to prevent interference and to allow persons in sparsely populated areas to receive adequate signals. Petitioner contends, in effect, that under the First Amendment there is a presumption, to be litigated in the courts, that all of these stations should be able to broadcast at night.

tionally permissible and that "[d]enial of a station license on that ground, if valid under the Act, is not a denial of free speech." *Id.*, at 227.

The application of this standard requires the exercise of discretion by the Commission. Accordingly, in reviewing Commission decisions applying the standard, the courts traditionally determine whether the Commission's action was arbitrary, capricious or otherwise an abuse of discretion. See, *e.g.*, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 226-227. This approach has been applied to Commission decisions involving certain programming matters, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, and *National Broadcasting Co.* v. *United States*, 319 U.S. 190; to decisions on whether a license application should be granted, *e.g.*, *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A. D.C.), certiorari denied, 371 U.S. 821; and to Commission rules limiting the number of stations an individual or company can own, cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204. Essentially the same standard of review has been applied in a long series of cases which have affirmed Commission decisions refusing to waive frequency allocation rules. See, *e.g.*, *Industrial Broadcasting Co.* v. *Federal Communications Commission*, 437 F. 2d 680 (C.A. D.C.); *560 Broadcast Corp.* v. *Federal Communications Commission*, 418 F. 2d 1166 (C.A. D.C.); *Rio Grande Family Radio Fellowship, Inc.* v. *Federal Communications Commission*, 406 F. 2d 664 (C.A. D.C.); *Chambers-*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1972.

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